Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-406

THE ESTATE OF NOLVERT P. SCOTT, JR.,
Individually and on behalf of all
other persons similarly situated,

Petitioner,

v.

THE UNIVERSITY OF DELAWARE, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF CASES	ii
ARGUMENT	1
I. THE JUDGMENT AGAINST DR. SCOTT ON HIS INDIVIDUAL CLAIM WAS BASED UPON A REVIEW OF ALL THE EVIDENCE AND WAS PROPERLY AFFIRMED	1
II. THE PLAINTIFF'S CLASS WAS ILLUSORY	3
III. NO CROSS-APPEAL WAS REQUIRED BECAUSE APPELLEE DID NOT ATTACK THE JUDGMENT	7
CONCLUSION	10

TABLE OF CASES

Cases	Page
Board of Trustees of Keene State College v. Sweeney, ____ U.S. ____, 99 S.Ct. 295, 58 L.Ed. 2d 216 (1978)	3
Dandridge v. Williams, 397 U.S. 471 (1970)	7
East Texas Motor Freight v. Rodriguez, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed. 2d 543 (1977)	6
Furnco Construction Corporation v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed. 2d 957 (1978)	3
Joseph v. Norman's Health Club, Inc., 532 F.2d 86 (8th Cir. 1976)	7, 8
Morley Construction Company v. Maryland Casualty Company, 300 U.S. 185 (1937)	7
Tolbert v. Western Electric Company, 56 F.R.D. 108 (N.D. Ga. 1972)	5
Townsend v. Nassau County Medical Center, 558 F.2d 117 (2d Cir. 1977) cert. den., 434 U.S. 1015 (1978)	6
United States v. American Ry. Express Company. 265 U.S. 425 (1924)	7
White v. Gates Rubber Company, 53 F.R.D. 412 (D.Col. 1971)	5

I. THE JUDGMENT AGAINST DR. SCOTT ON HIS INDIVIDUAL CLAIM WAS BASED UPON A REVIEW OF ALL THE EVIDENCE AND WAS PROPERLY AFFIRMED.

The petitioner has focused on a statement by the court of appeals that the district court found that Dr. Scott had failed to establish a prima facie case. Petitioner then argues that an erroneous standard of proof was employed. However, it is apparent that the court of appeals mis-spoke when it said that the district court concluded "that Scott had failed to establish a prima facie case" (A-74). Had the district court so concluded it would have been unnecessary for it to examine and analyze the evidence adduced by the University to rebut Dr. Scott's case. In fact, the district court made a careful and thorough investigation of the evidence presented by both sides and concluded on the totality of the evidence that Dr. Scott was not the victim of racial discrimination by the University and was treated no differently than non-black faculty members (A-50).

> "It is clear from the record that from September of 1971 until the time of his evaluation for contract renewal, Scott had undertaken very little in the way of research and had produced nothing by way of scholarly publication. Moreover, he had nothing of substance underway or planned at the time of the May, 1973 decision on renewal. These deficiencies weighed heavily against him in the minds of most of the Sociology faculty, (Finner, F-188, G-6; Brown, G-48; Eckhardt, G-76; Harlan, H-9; Dynes, H-24; McFarlane, DX-23, p. 14)." (A-41-42)

"During Scott's first year and the spring of his second, Chairman Scarpitti and other members of the faculty received numerous complaints from their advisees and other students of the kinds described in Scarpitti's letter. There was also a Student Government Association course evaluation in the fall of 1971, which rated Scott's 'Social Problems' course. (DX-18). In that student evaluation, only 29% of the class responded (35 of 120). 45.5% of those responding believed that the lectures contained mainly irrelevant materials. 55.9% believed that the course had not contributed to their growth or development. 70.5% felt Scott, as a teacher, was 'below average' or a 'bummer'. Finally, 81.2% said they would not recommend Scott as a professor." (A-42-43)

* * *

"47. Dr. Scarpitti testified that he received twelve to fifteen such complaints. (Scarpitti, F-133, F-62-66; see also DX-14). Similar complaints were received by other faculty members. (Brown, G-50; Eckhardt, G-77; Wenger, G-113; Harlan, H-8; McFarlane, DX-23, p. 14). There is also record evidence from students demonstrating dissatisfaction with his teaching performance. (Dykes, G-84). There is also evidence indicating that the enrollment in Scott's 'American Minorities' course fell from 85 to 5 over the three years Scott taught at the University. (Scarpitti, F-90)." (A-42, footnote 47).

* * *

"The ultimate decision to be made in any racial discrimination case where the plaintiff makes a claim of disparate treatment is whether it is reasonable to infer from all the evidence that the challenged action was based in whole or in part upon race." (A-44)

"Based on all the evidence, I conclude that the failure of the University to renew Scott's contract resulted from the opinion of nine members of the Sociology Department that he was not, and would not develop into an acceptable permanent professional colleague. This opinion was based primarily on what they considered to be a demonstrated lack of interest in pursuing the kind of scholarship, research and writing which they thought to be significant, and secondarily, on the view that one with the teaching experience which Scott had should have developed greater effectiveness in relating with students. (A-45-46)

Quite clearly the University's articulation of legitimate, non-discriminatory reasons for the decision not to renew Dr. Scott's contract meets the standards set out in *Furnco Construction Corporation v. Waters*, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed. 2d 957 (1978) and *Board of Trustees of Keene State College v. Sweeney*, ___ U.S. ___, 99 S.Ct. 295, 58 L.Ed. 2d 216 (1978)..

The court of appeals held that the evidence supported the district court's findings of fact and that these findings were not clearly erroneous. It therefore affirmed the judgment against Dr. Scott on his individual claims. (A-75-76). Clearly, it was correct in doing so and petitioner's argument about an erroneous standard of proof for establishing a prima facie case is irrelevant.

II. THE PLAINTIFF'S CLASS WAS ILLUSORY

At the time of trial there were 27 past or present black faculty members. (A-30) Three of these testified for plaintiff but none of the three claimed to have been dis-

criminated against by the University and none of the three claimed that any other black faculty member or prospective black faculty member had ever been discriminated against by the University. It should be apparent that Dr. Scott's claim was never typical of the claims of past and present faculty members when none of them felt aggrieved. The district court summed up the evidence concerning black faculty members:

> "Finally, with respect to renewals, there is no evidence of any black faculty member other than Dr. Scott who has not had his contract renewed. Indeed, no faculty member other than Dr. Scott is identified in the record as one claiming to be a victim of any racial discrimination in renewal, promotion or tenure at the University." (A-66)

Between 1972 and time of trial fifty-five blacks were known to be involved as candidates for faculty positions (A-61). Sixteen blacks were hired (A-30) and offers were made to other blacks who declined (A-31-33). No unsuccessful black candidate for faculty employment ever claimed that he had been discriminated against in recruitment or hiring. The district court referred to this as a "significant gap" in plaintiff's evidence, saying:

> "Despite the voluminous testimony in this case, not one individual has been identified who claims to have been discriminated against in the hiring process on grounds of race, and, as earlier indicated, at least one of plaintiff's witnesses familiar with the University scene over a substantial period of time testified that he knew of no black who had been interested in employment with the University and who had been unfairly denied a job opportunity."

It should be apparent that Dr. Scott's claim was never typical of the claims of unsuccessful black applicants for faculty employment because (1) there was no showing that any member of the class felt aggrieved, and (2) Dr. Scott was recruited and hired by the University at a substantially higher salary than it paid comparable white candidates (A-25).

Furthermore, Dr. Scott never satisfied the numerosity requirement of Rule 23. The court of appeals so held with respect to past and present faculty members (A-88). It recognized the University's contention that the applicant class was merely hypothetical and that the numerosity requirement was unsatisfied (A-82) but never reached this contention because of its holding that Dr. Scott's claims were not typical of the applicant class (A-84).

Neither the district court nor the court of appeals addressed the University's threshold contention that courts should not concern themselves with class action litigation when there is no showing of the existence of a class of persons who feel aggrieved and need representation. Compare *White v. Gates Rubber Company*, 53 F.R.D. 412, 415 (D.Col. 1971) where the court held that a class will not be certified until there is a showing "that there is, in fact, a class needing representation."; and *Tolbert v. Western Electric Company*, 56 F.R.D. 108, 114 (N.D.Ga. 1972) where the court said: "The court cannot allow a class action where there is no class, even in a Title VII case . . ."

If the petition for certiorari were to be granted and this case remanded, the courts below would have to confront a class action where there is no class in need of representation and the typicality and numerosity requirements of Rule 23 cannot be satisfied.

Furthermore, it should be apparent that this case is

not the vehicle for a clarification of *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed. 2d 543 (1977) as urged by petitioner, if, in fact, any clarification is required.

> "As this Court has repeatedly held, a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members."
>
> * * *
>
> "The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination." *East Texas Motor Freight v. Rodriguez*, 431 U.S. at 403 and 405-406.

Where, as here, there was no showing that any class member ever complained that he had suffered an injury or had been the victim of discrimination, there was nothing with which to compare the plaintiff in order to ascertain whether he had suffered the same injury as the class members. Unlike most Title VII class actions, in this case not a single institutionalized discriminatory employment practice was shown by Dr. Scott, unless the requirement of a Ph.D. or its equivalent fell into that category[1]; and as to that the court of appeals properly held that Dr. Scott was not an adequate representative because he possessed such degree.

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[1]Contra, *Townsend v. Nassau County Medical Center*, 558 F.2d 117 (2d Cir. 1977), cert. den., 434 U.S. 1015 (1978).

III. NO CROSS-APPEAL WAS REQUIRED BECAUSE APPELLEE DID NOT ATTACK THE JUDGMENT

The petitioner claims the Scott decision is in direct conflict with *Joseph v. Norman's Health Club, Inc.*, 532 F.2d 86, 88 ftn. 2 (8th Cir. 1976). In fact, both decisions are consistent with established doctrine and there is no need for this court to speak further to such principles. The Scott decision is supported by the "inveterate and certain" rule that an appellee may, without filing a cross-appeal, "urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it"[2]; and the *Norman's Health Club* decision is supported by the corollary of the rule that "what (an appellee) may not do in the absence of a cross-appeal is to attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary . . ."[3]

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[2]Morley Construction Company v. Maryland Casualty Company, 300 U.S. 185, 191 (1937), *quoting* United States v. American Ry. Express Company, 265 U.S. 425, 435 (1924). *See also* Dandridge v. Williams, 397 U.S. 471, 475-76 n. 6 (1970).

[3]Morley Construction Company, supra, 300 U.S. at 191, quoting American Ry. Express Company, supra, 265 U.S. at 435.

In *Scott* the majority of the court of appeals recognized that in challenging the class certification the University did not seek to enlarge its own rights or lessen those of its adversary.[4] As the concurring opinion pointed out, the University was the prevailing party on the merits of the class action and would have preferred not to have the judgment in its favor disturbed; it raised the class action certification issue merely to preserve a back-up ground for protecting the judgment in its favor[5] (A-93).

In the *Norman's Health Club* decision, on the other hand, the appellee's challenge to the class action certification would have lessened the rights of its adversary. The defendants were Norman's Health Club, Inc. and two finance companies to which the Club assigned promissory notes signed by plaintiffs. In the district court there was a judgment in favor of the class against the Club, but a judgment against the plaintiffs in favor of the finance companies.

The plaintiffs appealed the judgment in favor of the finance companies and no cross-appeals were filed by the Club or the finance companies. On appeal, one of the finance companies sought to challenge the class certification but the district court refused to reach the question because no cross-appeal had been filed, saying that the appellee could not attack a judgment to enlarge his rights or lessen the rights of his adversary unless he filed a cross-appeal. Although appellee's rights would not have

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[4]"Since the University prevailed upon the merits of the class claims in the district court, its attack upon the class certification on appeal will not enlarge its own rights or lessen those of its adversary." (A-77, ftn. 12)

[5]To the extent that appellee's raising the class certification issue results in an alteration of the judgment, the rights of the appellee are lessened rather than enlarged because it loses the res judicata effect on the class.

been enlarged, the right of plaintiffs would have been lessened because they would have lost the judgment in favor of the class against the Club if the class had been decertified.

Although it determined that the class action certification was reviewable, the majority of the court of appeals chose, inexplicably, not to rest its decision concerning reviewability on doctrine long settled by the opinions of this court, even though it recognized that the University did not seek to enlarge its own rights or lessen those of its adversary (A-77-79). The concurring opinion found this "somewhat troublesome" because in its view there was no need for the University to file a cross-appeal in order to preserve a back-up ground for protecting a judgment in its favor when an appeal had already been filed from that judgment (A-92-93).

We, too, found the majority's analysis "somewhat troublesome" because of its implicit criticism of our appellate procedures which we thought were based upon settled doctrine. Nevertheless, the majority reached the proper end result and it would serve no useful purpose in this case to remand a legally correct result for a modification of the reasoning which led to such result.

CONCLUSION

For the foregoing reasons this court should deny the petition for certiorari to review the judgment of the court of appeals.

Respectfully submitted,

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Dated: Oct. 3, 1979

AFFIDAVIT OF MAILING

STATE OF DELAWARE

COUNTY OF NEW CASTLE

SS.

BE IT REMEMBERED that on this 3rd day of October, 1979, before me, the Subscriber, a Notary Public for the State and County aforesaid, personally appeared Therese M. Hogan, who, being duly sworn according to law, did depose and say that she mailed today, by regular mail, postage prepaid, three copies of the within BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the following attorneys:

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SWORN TO AND SUBSCRIBED before me the day and year aforesaid.
